TABLE OF CONTENTS

	page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutory Provisions Involved	3
Statement	4
Argument	8
I. The Petition Raises No Substantial Federal Question	9
II. Petitioners Cite No Conflict With Federal Law	11
Conclusion	13

TABLE OF AUTHORITIES

Statutes:

29 U.S.C. § 158	11
29 U.S.C. § 158(a)	10
29 U.S.C. § 158(b)	10
29 U.S.C. § 158(d)	10, 11, 12
29 U.S.C. § 158(e)	11
29 U.S.C. § 185	3

Cases:

Clothing Workers v. NLRB, 324 F.2d 228 (2nd Cir. 1963)	12
Electrical Workers v. Control Products Co., 330 F. Supp. 250 (W.D. Pa. 1971)	13
Gatliff Coal Co. v. Cox, 152 F.2d 52 (6th Cir. 1945)	12
H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941)	11
Joy Mfg. Co., 44 L.A. 469 (1965)	10
Lewis v. Lowry, 295 F.2d 197 (4th Cir. 1961)	12
Lewis v. Young & Perkins Coal Co., 190 F. Supp. 838 (W.D. Ky. 1960)	12

NLRB v. Gulf Atlantic Warehouse Co., 291 F.2d 475 (5th Cir. 1961) 13
Pennsylvania Truck Lines, Inc., 42 L.A. 311 (1964) . 10
Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962) 9, 12
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 12

Other Authorities:

3 Corbin on Contracts 451, section 582 (1960) 4

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-612

BEN DeVORE, et al.,

Petitioners,

vs.

WEYERHAEUSER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Oregon Supreme Court (App. B of Petition) is reported at 96 Ore. Adv. Sheet 1237, — P.2d — (1973).

JURISDICTION

Jurisdiction to review the decision below would not lie under 28 *U.S.C.* § 158, as claimed by the petitioner, but could be sought under 28 *U.S.C.* § 1257(3).

QUESTIONS PRESENTED

1. In a proceeding by employees to enforce a written collective bargaining agreement will a prior oral agreement be effective where

(a) the employer and the union agree that the prior oral agreement was not intended to be included or contained in the written master bargaining agreement; or

(b) the prior oral agreement is subsequently admitted in a writing signed by the president of the union who was also the chairman of the union negotiating committee; or

(c) the conduct and action of the union and the employer is consistent with the prior oral agreement; or

(d) the local bargaining agreement signed subsequent to the master contract is consistent with and implements the prior oral agreement.

2. If the petition is granted, respondent will also argue that the decision below should be sustained as to some or all of the petitioners because

(a) approximately half of the petitioners were employed as dry chain pullers receiving a "grandfather rate," and were not, therefore, entitled to the wage increase in issue;

(b) the written local bargaining agreement and wage schedule, subsequent to the master agreement, does not provide for payment of the disputed wage increase;

(c) bargaining unit members are bound by the good faith collective bargaining agreements by their exclusive agent for collective bargaining.

STATUTORY PROVISIONS INVOLVED

United States Code Title 29

Section 185:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 158:

(a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a).

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, * * * and the execution of a written contract incorporating any agreement reached if requested by either party, * * *.

STATEMENT

The record in this case was not filed with the petition, but the facts are thoroughly summarized in the opinion of the Oregon Supreme Court. Because the case was in equity the Oregon Supreme Court reviewed the record de novo and made its own findings of fact. Accordingly, reference will be made to that opinion.

This case was a suit in equity in the Circuit Court for Klamath County, Oregon, for specific performance of a collective bargaining agreement, where plaintiffs, individual employees claimed wages were due and unpaid. The unions involved were never made parties to the proceeding. After a bench trial with judgment for the plaintiffs the respondent appealed and the Oregon Supreme Court reversed. The petitioners seek reivew of that decision claiming error in the application of an exception to the parol evidence rule. The specific rule applied is discussed in 3 *Corbin on Contracts* 451, section 582 (1960):

> "* * * the oral admissions of the plaintiff that the agreement included matters not contained in the writing may be proved to show that it was not assented to as a complete integration, however complete it may look on its fact. * * *" (Pet. p. 29)

Respondent contests the petition because the parol evidence issue is obscured by a subsequent letter and written local bargaining agreement, the decision is correct on its merits, and raises no substantial issue in conflict with federal law.

Plaintiffs are a group of approximately 45 employees of the respondent (Weyerhaeuser) at the Weyerhaeuser Klamath Falls, Oregon, sawmill. The local bargaining unit of which the plaintiffs were members has approximately 1500 members, while the industry wide bargaining unit involved in master contract negotiations had approximately 25,000 members.

The dispute in this case is over a wage increase of 25¢ per hour for those plaintiffs employed as green chain pullers and 20¢ for those working as dry chain pullers. A description of the bargaining procedure followed by the employer and the union is essential because plaintiffs base their claim on the industry wide master contract and, Weyerhaeuser defends principally on the fact that the subsequent written local contract did not provide for payment of the disputed wage increase to plaintiffs.

The master contract on which the plaintiffs rely was negotiated by an employer group, the National Forest Products Association, including Weyerhaeuser, and two unions, the International Woodworkers of America, Region III, and the Lumber and Sawmill Workers. The authority of the union to represent plaintiffs was admitted. (Pet. p. 29) The bargaining practice between the unions and the employers was to negotiate an industry wide master contract and then implement its terms in local bargaining agreements which would also include any local agreements resulting from local bargaining. Usually local agreements were reached prior to the master contract which contains a

provision closing out all unresolved local issues, but in fact some local bargaining continued and where agreements resulted they would be included in the local agreement. Neither the master or local agreements have an arbitration clause.

In this case the bargaining on the disputed wage increase in the master contract was done principally in a subcommittee with representatives of both the unions and employers, including a representative of Weyerhaeuser. In this subcommittee the Weyerhaeuser representative objected to payment of the classification or bracket increase, and it was concluded that the plaintiffs' right to the increase was a local issue which should be referred to the local union, and resolved there. One of the reasons for this referral was that there was a question as to the type of wage rate and the amount of the wage level immediately prior to the industry bargaining. This confusion arose because the pullers had at one time been on a piece work rate, and the green chain pullers were in the process of changing from a piece work rate to an hourly rate, and the representatives of the parties felt that this issue was still in the process of local bargaining and the local grievance procedure. (Pet p. 19) The oral agreement to refer to the local union the issue of the plaintiffs' right to the bracket increase was not written into the master contract which deals essentially with industry issues, not local issues. (Pet. p. 22)

After the settlement agreement was signed by the employers and the unions, the regional union office mailed it to the local unions with the recommendation that it be approved as submitted. The local union membership of all the locals involved, about 25,000 members, approved the agreement by a majority of approximately two to one. (Pet-

p. 24) Some of the plaintiffs attended this meeting of their local union because they had heard a "rumor" that they were excluded from the bracket adjustment. They were advised by their business agent that he knew of no such agreement, and that nothing about it appeared in the settlement agreement. (Pet. p. 23)

After the settlement agreement was signed and ratified Weyerhaeuser and the union negotiated over the payment of the classification adjustment to the plaintiffs, but no agreement was reached.

On those local issues where there was agreement the terms were included in the local bargaining agreement. That agreement, which Weyerhaeuser claims is the final or definitive agreement does not refer at all to the classification adjustment. Instead the provisions of the master contract on the disputed wage increase were implemented through the rates provided in the written wage schedule prepared as part of the local agreement. (Pet. p. 23) Since the local working agreement was pleaded by plaintiffs, and plaintiffs also admitted that it established the terms and conditions of their employment, Weyerhaeuser argues that the plaintiffs' contract claim must fail. For the same reason it would be inappropriate to review the parol evidence issue since the final writing between the parties, including all local and industry wide agreements, does not provide for payment of the disputed wage increase.

The parol evidence issue on which review is sought is thus a preliminary issue to the full consideration of the case on the merits, although it is clear that when it was decided adversely to plaintiffs by the Oregon Supreme Court there was no need to consider any other issue in the case. The issue raised in the petition is further obscured by a subsequent letter admitting the agreement and a subse-

quent oral agreement. After the master contract was signed, the president of Region III of the International Woodworkers acknowledged the oral agreement on the disputed wage increase in a letter to the business agent of the Klamath Falls local union. (Pet. p. 24) Also after the master contract was signed the union and Weyerhaeuser agreed that the disputed wage increase would not be paid to employees holding a "grandfather rate." About half of the plaintiffs are employed on the dry chain and pursuant to an earlier and unrelated agreement they hold such a grandfather rate. (Pet. p. 24-25)

ARGUMENT

This case arises from labor negotiations between the plaintiffs' union and Weyerhaeuser, held in June of 1969, which resulted in an industrywide settlement agreement, and on the issue in this case, an oral agreement that plaintiffs' right to a bracket or extra wage increase was not included in the master contract. That issue was to be settled in further bargaining. The bargaining was held pursuant to the oral agreement and some of the plaintiffs participated, but it did not result in any agreement. Since there were written and oral admissions that the union and the employer did not intend to include the plaintiffs' claim in the written settlement agreement, the Oregon Supreme Court held that the settlement agreement was not an integration on this issue and the oral agreement was a good defense to the plaintiffs' claim.

The petition does not specify in any detail the question on which review is sought other than that the Oregon Supreme Court erred in applying an exception to the parol evidence rule. There is no argument that the Court applied the wrong law, or that it erred in referring to general prin-

ciples of law recognized in the forum state and other jurisdictions. This case is, therefore, unlike *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962), where the state court decided the substantive issues in a collective bargaining case exclusively in terms of local contract law. Thus, the narrow and only question for review is the propriety of the exception to the parol evidence rule applied by the Oregon Supreme Court. Even this narrow issue is not clearly present on the record since the parol evidence rule in whatever form operates only on contemporary oral agreements. In this case a union official, the president of the regional council and chairman of the negotiating committee, confirmed the "oral" agreement in a letter written after the master contract (see opinion below, Pet. p. 24), so the alleged oral agreement is in fact evidenced by a writing. As noted by the court below, there is another subsequent writing, the local agreement, that is consistent with the oral agreement. (Pet. p. 24) In light of these writings there is no clear presentation of the parol evidence issue which would justify granting review on the merits.

I.

The Petition Raises No Substantial Federal Question

Since this case concerns the propriety of only one narrow exception to the parol evidence rule, which is only one rule in the federal law of collective bargaining agreements, a decision on the merits would add only one minor and esoteric rule to that body of federal law.

Since the question is so narrow, it is not surprising that it is unlikely to have any substantial impact on future litigation. The lack of any real substantiality occurs by reason of the unique facts inherent in the rule of law at issue, and

the availability of arbitration and administrative remedies as an alternative to litigation.

First, since the issue on which review is sought will arise only where a party admits the oral agreement and that there was no integration, the parol evidence rule becomes at best a highly technical issue. The party relying on the parol evidence rule must by definition *admit an agreement, and its exclusion from the writing*, but refuse to live up to it. This bad faith, in actuality as well as under the Labor Act, would be so distasteful to most parties as to insure a resolution of the dispute outside the courts. In fact, in this case the union that made the agreement refused to disclaim it, but the plaintiffs were dissatisfied with the bargain and brought this litigation.

Second, the collective bargaining agreement in this case is unusual in that it does not have an arbitration clause. All parties to the contract, including the plaintiffs, admitted the existence and validity of the bargaining agreements, and the effect of the oral agreement. This type of dispute could and would normally be resolved in the grievance and arbitration procedures, not in the courts. There are a great number of labor arbitration decisions considering parol evidence, see *e.g., Pennsylvania Truck Lines, Inc.*, 42 L.A. 311 (Krimsely, Arb. 1964) (parol evidence allowed); *Joy Mfg. Co.*, 44 L.A. 469 (Mittenthal, Arb. 1965) (alleged oral agreement denied by one party, oral agreement invalid).

Third, it is also possible that a case such as this could be adjudicated by the National Labor Relations Board (NLRB). The party who claims the oral agreement could request, pursuant to 29 *U.S.C.* § 158(a) or (b) and (d) that the agreement be reduced to writing and signed. The duty to bargain in good faith as defined in 29 *U.S.C.*

§158(d) includes this obligation, *Cf., H. J. Heinz Co. v. NLRB,* 311 U.S. 514 (1941), and the NLRB will order compliance with such a request. The respondent attempted to use this remedy in this case by filing an unfair labor practice charge against the union, but the General Counsel of the NLRB refused to issue a complaint. Although there was no evidentiary hearing or decision on the merits, the basis for the denial, as set out in two letters (Pet. App. E), was that the Regional Director and the General Counsel felt that there was no oral agreement to enforce. On a full record the Oregon Supreme Court found to the contrary. Despite respondent's lack of success with the administrative remedy, it would be available in any labor case where one party admits an oral agreement, and it would also be available in the absence of arbitration. The advantages of proceeding before the NLRB, such as ease of filing, less formal procedure, and investigation and prosecution by the office of the General Counsel, reduce the probability that labor cases involving an admitted oral agreement will ever reach the courts.

II.

Petitioners Cite No Conflict With Federal Law

In the petition, Part VII, page 5, it is claimed without argument or citation that the decision below conflicts with 29 *U.S.C.* § 158 and the decisions of the United States Supreme Court. As to the statute, 29 *U.S.C.* § 158(e), quoted in the petition, deals with secondary boycott or hot cargo agreements, and has no relevance here. The basic elements of the duty to bargin in good faith are set out in 29 *U.S.C.* § 158(d), including *inter alia,*

> "the execution of a written contract incorporating any agreement reached if requested by either party, . . ."

This provision does not compel a written agreement, but only makes it available on request. In fact, the Second Circuit and the NLRB have held that § 158 requires the inclusion of an oral concession in a written bargaining agreement. *Clothing Workers v. NLRB*, 324 F.2d 228 (2nd Cir. 1963). Since § 158(d) permits, but does not require, a written agreement, it presents no conflict with the decisions below.

Turning to the matter of conflict between the decisions of the United States Supreme Court and the decision below, the petitioners have suggested none and none come to mind. Certainly there is no conflict between the reasoning of the decision below and the general teachings of *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) and *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962), which would allow reference to general principles of law in collective bargaining cases.

The opinions in *Lewis v. Young & Perkins Coal Co.*, 190 F. Supp. 838 (W.D. Ky. 1960), and *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945), were cited in plaintiffs' brief to the Oregon Supreme Court which was attached to the petition. (Pet. p. 55) These cases involve facts so far removed from the instant case that they are not germane. These cases and others like them, principally in the coal industry, *e.g.*, *Lewis v. Lowry*, 295 F.2d 197 (4th Cir . 1961), and 322 F.2d 453 (4th Cir. 1963), involve fraud, bad faith, secret agreements, sham, trickery and clearly present actions contrary to public policy as well as national labor policy which encourages agreements rather than fraud, bad faith or trickery. The coal cases arose

from claimed oral agreements that written contracts were to be a sham because the written contracts were entered only to present appearances that the union had obtained an industry pattern agreement. No evidence of bad faith, trickery or deceit is present here, nor have such issues even been raised by the plaintiffs.

The two other federal court decisions cited to the Oregon Supreme Court by plaintiffs (Pet. p. 55) are also unlike the instant case. In *Electrical Workers v. Control Products Co.*, 330 F. Supp. 250 (W.D. Pa. 1971), the court ordered arbitration even though a protesting employer claimed that the union's claim could be proved only by parol evidence. In *NLRB v. Gulf Atlantic Warehouse Co.*, 291 F.2d 475 (5th Cir. 1961), the NLRB and the court refused to find a waiver during bargaining of the right to receive a seniority list during the term of the bargaining agreement. As an additional reason for rejecting the employer's argument the court said that it was "unwilling to abandon completely the parol evidence rule when dealing with this type of contract." 291 F.2d 475. This lukewarm reference to the parol evidene rule can hardly be built up into a conflict with the decision below.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari in this proceeding should be denied.

Respectfully submitted,

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